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Supreme Court of the United States.

OCTOBER TERM, 1974.

No. 73-1808.

JAMES BURNETT McKAY LAING,
PLAINTIFF-APPELLANT,

v.

UNITED STATES OF AMERICA ET AL.,
DEFENDANTS-APPELLEES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Brief for the Plaintiff-Appellant.

JOSEPH S. OTERI,
RUDOLPH F. PIERCE,
CHARLOTTE A. PERRETTA,
MARTIN G. WEINBERG,
CRANE, INKER & OTERI,
20 Ashburton Place,
Boston, Massachusetts 02108.
(617) 227-4882

ADDISON C. GETCHELL & SON, INC. · THE LAWYERS' PRINTER · BOSTON

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Supreme Court of the United States.

October Term, 1974.

No. 73-1808.

JAMES BURNETT McKAY LAING,
Plaintiff-Appellant,
v.
UNITED STATES OF AMERICA et al.,
Defendants-Appellees.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Brief for the Plaintiff-Appellant.

Opinions Below.

The opinion of the Court of Appeals (App. C) is reported at 496 F. 2d 853 (2d Cir. 1974). The opinion of the District Court is reported at 364 F. Supp. 469 (D.Vt. 1973) (App. B).

Jurisdiction.

The judgment of the Court of Appeals was entered on May 2, 1974. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented.

1. Whether the Internal Revenue Service can employ 26 U.S.C. § 6851 to terminate a taxpayer's taxable year without following the procedure prescribed in 26 U.S.C. § 6861?

2. Whether the procedures followed by the Internal Revenue Service in performing its jeopardy assessment and seizure conformed to the due process requirements of the Fifth and Fourteenth Amendments to the United States Constitution?

Statutes Involved.

All pertinent statutes appear in the Addendum to this brief.

Statement of the Case.

On May 31, 1972, plaintiff, a citizen of New Zealand, entered the United States from Canada on a B-2 visa. On June 24, 1972, plaintiff and two companions attempted to enter Canada by way of Vermont but were refused entry into Canada by Canadian officials. Petitioner remained in the United States where he was stopped in an automobile by United States customs officials at Derby, Vermont. The customs officials conducted a search and discovered a suitcase containing approximately $310,000 in the engine compartment of the automobile and plaintiff-petitioner and his companions were detained at the border (A. 16).

Later that day, Fulton Fields, the District Director for the Internal Revenue Service for the District of Vermont, was advised by customs officials of the above facts, and, relying on them, found that petitioner and those with him were

in the process of putting their assets beyond the reach of the Government by removing them from the country, thereby tending to prejudice or render ineffectual this collection of the tax alleged to be due. Agent Fields then terminated the 1972 taxable years of the three individuals pursuant to 26 U.S.C. § 6851. Agent Fields sent two Internal Revenue Service agents, Joseph O'Kane, Chief of the Intelligence Division for the District of Vermont, and James Perry, Assistant Chief of the Collection and Taxpayer Service Division, Internal Revenue Service, Boston, Massachusetts, to the place of petitioner's detainment to take steps necessary to collect the tax liabilities of the petitioner and his companions (A. 16-17).

The agents interviewed plaintiff-petitioner and his associates and demanded immediate payment of their tax liabilities in the amount of $310,000 for each individual. Petitioner and his associates refused to make payments of their alleged tax liabilities and the agents contacted the Internal Revenue Service Center in Andover, Massachusetts, and requested and received orally a tax assessment upon each person in the amount of $310,000. The agents orally communicated the assessments to the plaintiff-petitioner and his associates and after a second refusal to make payment, the agents seized the money and applied it to the tax liabilities of the three individuals (A. 18-19).

Subsequently, on June 29, 1972, Edward Gallagher, Acting Director of the Internal Revenue Service in Burlington, Vermont, sent petitioner a written declaration made pursuant to 26 U.S.C. § 6851 informing petitioner that he was placing his assets beyond the reach of the Government and thus, his taxable year of 1972, was terminated and a tax of $195,985.55 for the period from January 1, 1972, to June 24, 1972, was assessed and made payable (A. 23-24).

On July 15, 1972, plaintiff-petitioner filed an equitable action seeking an injunction against the continued posses-

sion by the Internal Revenue Service of the seized money and seeking also a declaratory judgment that the provisions of the Internal Revenue Code under which the assessment and levy of his property were made were unconstitutional (A. 7-12, 19-20). On September 18, 1972, the defendants-respondents filed a motion to dismiss or in the alternative for summary judgment (A. 15). After hearings thereon, on September 12, 1973, the District Court (Coffrin, J.) entered an opinion and order which granted the Government's motion (A. 25-32). The District Court opinion was based substantially on the holding in *Irving* v. *Gray*, 479 F. 2d 20 (2d Cir. 1973), in which the United States Court of Appeals for the Second Circuit stated that § 6861 did not apply in the case of a jeopardy assessment made in respect to a departing or concealing taxpayer assessed under § 6851. Petitioner appealed and the Court of Appeals affirmed, adhering to its decisions in *Irving, supra.*

Summary of Argument.

Petitioner contends that the Internal Revenue Code sets forth a comprehensive, cross-related scheme of laws to regulate the collection of the internal revenue; and that one section cannot be employed or interpreted without reference to its place in the Code as a whole.

Proceeding from this contention, petitioner maintains that the express language of the relevant provisions of the 1954 Code, specifically, sections 6201(d), 6216(2), 6213(a), 6851 and 6861, require that the I.R.S. find its assessment authority in and follow the procedural requirements of § 6861 of subchapter A of chapter 70 in a quick termination proceeding pursuant to § 6851. This conclusion, petitioner submits, is supported by the legislative history of both § 6861 and § 6851.

The legislative history of these provisions evidences a clear intent by Congress to mitigate the harshness of the pay first-litigate later rule both in year-end deficiency situations and in jeopardy situations as well.

Further, petitioner contends that the court's holdings below in *Irving* v. *Gray*, 479 F. 2d 20 (2d Cir. 1973), and in *Laing* v. *United States*, 496 F. 2d. 853 (2d Cir. 1974), are erroneous in that they are predicated on three false assumptions:

1. that in a jeopardy proceeding pursuant to § 6851, the Service can find its assessment authority outside of subchapter A of chapter 70 (the jeopardy provisions);
2. the "thing" assessed in a jeopardy proceeding under § 6851 is not a deficiency within the definition of § 6211(a) of the 1954 Code; and
3. the amount assessed is not a tax imposed.

Additionally, petitioner asserts that the procedure followed by the Service in the case at bar does not conform to the requirements of due process, in that it is devoid of any notion of a "prompt post seizure" hearing in a situation where there exists no compelling governmental interest to justify the delay between assessment and seizure of petitioner's property and his first opportunity to appear before a judicial forum.

This contention is predicated on the following facts: (1) that the summary assessment and seizure procedure necessarily imposes a hardship on the taxpayer, (2) that after the taxpayer' property is seized, the compelling governmental interest to secure the collection of the internal revenue no longer exists, and (3) that after the internal revenue is secure the protection of the taxpayer's interest becomes paramount.

Petitioner concludes that the procedure followed by the Service is defective in that it allows the Service to circumvent all the procedural safeguards embodied in subchapter A of chapter 70, thereby making it possible for a taxpayer's property to be seized and sold without due process of law.

Argument.

I. In All Jeopardy Proceedings the Taxpayer is Entitled to a Deficiency Notice as Prescribed by 26 U.S.C. § 6861.

A. *Introduction.*

Petitioner argues herein that the Court of Appeals, in reliance upon its decision in *Irving* v. *Gray*, 479 F. 2d 20 (2d Cir. 1973), erroneously affirmed the dismissal of his complaint.

The erroneous holding in *Irving* is predicated upon three cases: *Littauer & Co.* v. *Commissioner of Internal Revenue Service*, 37 BTA 840 (1938); *Puritan Church-The Church of America* v. *Commissioner*, 10 CCH Tax Ct. Mem. 485 (1951); and *Williamson* v. *United States*, 31 Am. Fed. Tax R. 2d 73-800 (7th Cir. 1973).

In short, based on the *Littauer* holding, *supra*, 37 BTA at 843, and the *Puritan Church* decision, *supra*, 10 CCH Tax Ct. Mem. at 494, the *Williamson* court ruled:

> "[t]he deficiency notice requirement cannot be read into § 6851 because the assessment made under that section is not a deficiency as defined in § 6211. That section defines a deficiency as the amount by which the 'tax imposed' exceeds the amount shown as the tax return. The assessment in this case was not an imposed tax, but merely an amount which the I.R.S. believed justified the termination of the taxable year. Since no return had been filed at the date of the assessment, no deficiency was determinable. Ludwig Littauer & Co. Inc. v. Com'r of Int. Rev., 37 BTA 840, 843 (1938)." *Williamson, supra,* 31 Am. Fed. Tax R. 2d at 73-800.

Irving, supra, 479 F. 2d at 24, relied upon this holding, citing and quoting it, finding against the taxpayer. That this reasoning and logic has fallen into disrepute is evidenced not only by the opinions of the various Circuit Courts, but by a recent opinion of the Tax Court as well. Cf. *Clark* v. *Campbell*, 501 F. 2d 108 (5th Cir. 1974); *Rambo* v. *United States*, 492 F. 2d 1060 (6th Cir. 1974); *Nino Sanzogno* v. *Commissioner*, 60 T.C. 321 (1973). Indeed, it was noted that the *Sanzogno* case indicated that "the Tax Court is no longer comfortable with the *Littauer* rationale." *Clark, supra,* at 118.

Petitioner attacks the *Littauer-Williamson-Gray* trilogy on the ground that those cases fail to conform to the statutory requirements of the controlling sections of the Internal Revenue Code of 1954 and are instead predicated upon three incorrect assumptions:

1. In a jeopardy assessment situation under § 6851, subchapter A of chapter 70,[1] the I.R.S. can find its assessment authority in a provision outside the jeopardy assessment procedure set forth in subchapter A of chapter 70. *Littauer, supra,* 37 BTA at 842; *Williamson, supra,* 31 Am. Fed. Tax R. 2d at 73-800; *Gray, supra,* 479 F. 2d at 23-24.

2. In a short year jeopardy assessment under § 6851, the thing assessed is not a deficiency. *Littauer, supra,*

[1] 26 U.S.C. §§ 6851-6873.

37 BTA at 843; *Williamson, supra,* 31 Am. Fed. Tax R. 2d at 73-800; *Gray, supra,* 479 F. 2d at 24.

3. In a jeopardy situation under § 6851 the assessment does not constitute an "imposed tax." *Littauer,* 37 BTA at 843; *Williamson, supra,* 31 Am. Fed. Tax R. 2d at 73-800; *Gray, supra,* 479 F. 2d at 24.

These assumptions were extended to the case at bar: "We adhere to our decision in *Irving. . . .*" *Laing, supra,* 496 F. 2d at 854.

The errors in these assumptions are evidenced both by the specific language of the applicable sections of the Internal Revenue Code of 1954 and their legislative histories.

B. *In a Jeopardy Situation the I.R.S. Must Find its Assessment Authority in § 6861 of Subchapter A of chapter 70 and it Cannot Look Beyond the Procedures Set Forth Therein.*

1. Express Language of the Provisions.

When the express language of subchapter A of chapter 70 is studied, it is clear that the Service cannot go beyond its provisions to find its assessment authority. The Service's attempt to justify doing so is labyrinthine and futile; for provisions beyond subchapter A of chapter 70 only direct the Service back to its point of origination.

> "It is axiomatic that a true code—which Congress intended here to create—is primarily different from statutes in that a comprehensive cross-related scheme of laws is presented. No one section can be interpreted without reference to its place in the scheme. . . ." *Lisner* v. *McCauless,* 356 F. Supp. 398, 401-402 (D. Ariz. 1973).

In *Clark, supra,* 501 F. 2d at 121, the court noted, in citing *Lisner, supra,* that the Internal Revenue Code sets forth a "careful considered pattern" of laws to regulate the collection of internal revenue. A careful examination (or, as the *Clark* court described it, "we . . . painfully painstakingly dissect," *Clark, supra,* 501 F. 2d at 110) of the statutory language of the relevant provisions of the 1954 Code evinces the correctness of this assertion—that the Internal Revenue Code sets forth a "carefully considered pattern" of laws.

The actions of the Service are in disregard and in disruption of this coherent codification. In the case at bar, the Service insists that it can properly find its assessment authority, in a jeopardy situation under § 6851, outside the jeopardy assessment provisions of subchapter A of chapter 70.

In the present matter the Service believed that petitioner had placed his revenue in jeopardy as described in § 6851 which states, in pertinent part:

> "If the Secretary or his delegate finds that a taxpayer designs quickly to depart from the United States or to remove his property therefrom, or to conceal himself or his property therein, or to do any other act tending to prejudice or to render wholly or partly ineffectual proceedings to collect the income tax for the current or the preceding taxable year unless such proceedings be brought without delay, the Secretary or his delegate shall declare the taxable period for such taxpayer, together with a demand for immediate payticе of such findings and declaration to be given the taxpayer, together with a demand for immediate payment of the tax for the taxable period so declared terminated and of the tax for the preceding taxable year

> or so much of such tax as is unpaid, whether or not the time otherwise allowed by law for filing return and paying the tax has expired; and such taxes shall thereupon become immediately due and payable. In any proceeding in court brought to enforce payment of taxes made due and payable by virtue of the provisions of this section, the finding of the Secretary or his delegate, made as herein provided, whether made after notice to the taxpayer or not, shall be for all purposes presumptive evidence of jeopardy."

Having closed petitioner's taxable year pursuant to § 6851, the Service contends that it can properly find its assessment authority in § 6201(a)(1), wherein it is stated:

> "The Secretary or his delegate shall assess all taxes determined by the taxpayer or by the Secretary or his delegate as to which returns or lists are made under this title."

Section 6201, however, is entirely separate and apart from the assessment authority contained in subchapter A of chapter 70, *i.e.*, § 6861. As noted in *Clark, supra*, 501 F. 2d at 121, the distinction between the two sections (§ 6201 and § 6861) is that § 6201 is "the ordinary assessment provision," providing "generally the authority to assess uncontested taxes." It does not apply either to a year-end deficiency or to a jeopardy situation. *Clark, supra*, 501 F. 2d at 116-121; *Rambo, supra*, 492 F. 2d at 1062. This assertion is conclusively supported by § 6201(d), a cross-reference mandate which states:

> "For special rules applicable to deficiencies of income, estate, gift, and chapter 42 [private foundations] taxes, see subchapter B [§§ 6211-6216]."

The provisions of subchapter B, 26 U.S.C. §§ 6211-6216, prescribe those procedures to be followed in the situation where a normal year-end deficiency is involved. The assessment authority for such a situation is contained in § 6213, which provides, in pertinent part:

> "Except as otherwise provided in section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B [income taxes and estate and gift taxes, respectively] and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final."

Manifestly, the language of §§ 6201(d) and 6213 indicates the congressional purpose to create a comprehensive cross-related codification of laws to be followed by the Service in the collection of the internal revenue. This comprehensive scheme specifically directs the Service to subchapter A of chapter 70, 26 U.S.C. §§ 6851-6873, for the procedural requirements relating to assessment in jeopardy situations.

Section 6216 of subchapter B directs the Service to look elsewhere for its assessment authority in jeopardy situations by clearly stating:

> "For procedures relating to jeopardy assessments, see subchapter A of chapter 70."

Hence, the circle is complete and the Service returns to its point of origination. Subchapter A of chapter 70 presents only two situations in which income is in jeopardy. These situations are described in §§ 6851 and 6861. Yet, the lan-

guage of § 6216(2) does not limit its cross-reference mandate only to jeopardy situations under § 6861; rather, the cross-reference applies to all jeopardy situations in subchapter A, *i.e.*, it applies both to § 6851 and to § 6861. Thus, if the Service attempts to resort to § 6201 for its assessment authority (as it did in the case at bar) subsection (d) of that section (§ 6201) refers it to subchapter B (§§ 6211-6216) and § 6216(2) of this subchapter refers it back to subchapter A of chapter 70 "for procedures relating to jeopardy assessments." To ignore these congressional requirements is to extract and to isolate favorable provisions from a carefully enacted whole and to use those provisions as "wild cards" *without due regard for their place in the Code's comprehensive scheme. Lisner, supra,* 356 F. Supp. at 402. That this is what the Service seeks to do is clear because, as stated in *Lisner, supra,* 356 F. Supp. at 403:

> "Section 6861 is the *only* assessment authority in the Code designated 'jeopardy.' The attempt of the government to bypass the procedural requirements of section 6861 in this and other cases has led it on a path of convolutions and strained interpretations, instead of an attempt to find order in a highly structured code." (Emphasis in original.)

Petitioner contends that the express language of the statutes precludes the Service from seeking its assessment authority outside of subchapter A of chapter 70.

2. Intent of the Provisions.

The historical development of the statutory provisions here in discussion supports petitioner's position and is harmonious with the contentions advanced in support of the express language of the Code. Further, it detracts from the already "convolut[ed] and strained interpretations" of the Service.

Section 250(g) of the Revenue Act of 1918 [2] provided the I.R.S. with the authority to terminate a taxpayer's taxable year before its normal completion and declare taxes, for the shortened period, immediately due and payable. A condition precedent to such action was a finding by the Service that there existed prejudicial activity by the taxpayer which threatened collection of his taxes. It was noted in *Littauer, supra,* 37 B.T.A. at 841, that "the section has been repeatedly enacted in its present form since its first appearance as section 250(g) of the Revenue Service Act of 1918," and it now stands as § 6851 of the 1954 Code.[3]

Under the 1918 Act, the short-term taxpayer was in the identical position as all other taxpayers against whom assessments had been made: he was required to pay the tax

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[2] For purposes of comparison with 26 U.S.C. § 6851, § 250(g) states, in pertinent part:

> "If the Commissioner finds that a taxpayer designs quickly to depart from the United States or to remove his property therefrom, or to conceal himself or his property therein, or to do any other act tending to prejudice or to render wholly or partly ineffectual proceedings to collect the tax for the taxable year then last past or the taxable year then current unless such proceedings be brought without delay, the Commissioner shall declare the taxable period for such taxpayer and shall cause notice of such finding and declaration to be terminated at the end of the calendar month then last past given the taxpayer, together with a demand for immediate payment of the tax for the taxable period so declared terminated and of the tax for the preceding taxable year or so much of said tax as is unpaid, whether or not the time otherwise allowed by law for filing return and paying the tax has expired; and such taxes shall thereupon become immediately due and payable."

[3] For a tracing of these "repeated enactments" from 1918 up to 1938, the year of the *Littauer* holding, see *Littauer, supra,* 37 B.T.A. at 841, fn. 2. The source of this section's original enactment into the 1954 Code as § 6851, with the exception of the new addition of § 6851(b), was § 146 of the 1939 Code.

first and then proceed with a refund suit. "In both situations the Commissioner may assure collection without awaiting the Board's redetermination." *Littauer, supra,* 37 B.T.A. at 842.

The harshness of the pay-first, litigate-later rule was deliberately mitigated by Congress in succeeding revenue acts, first in 1924 and again in 1926.

> "Although a taxpayer may, after payment of his tax, bring suit for the recovery thereof and thus secure a judicial determination of the questions involved, he cannot in view of section 3224 of the revised statutes, which prohibits suits to enjoin the collection of taxes, secure such a determination prior to the payment of the tax. The right of appeal after payment of the tax is an incomplete remedy, and does little to remove the hardship occasioned by an incorrect assessment. The payment of a large additional tax on income received several years previous and which may have, since its receipt, been either wiped out by subsequent losses, invested in non-liquid assets, or spent, sometimes forces taxpayers into bankruptcy, and often causes great financial hardship and sacrifice. These results are not remedied by permitting the taxpayer to sue for the recovery of the tax after his payment. He is entitled to an appeal and to a determination of his liability for the tax prior to its payment." H.R. Rep. No. 179, 68th Cong., 1st Sess. (1924), cited in Seidman's *Legislative History of Federal Income Tax Laws, 1938-1861,* p. 759. See also: *Schreck* v. *United States,* 301 F. Supp. 1265, 1269 (D. Md. 1969); *Clark, supra,* 501 F. 2d. at 122; and *Rambo, supra,* 492 F. 2d at 1064.

To carry out its intent of deliberate mitigation, Congress established a non-prepayment forum, the Board of Tax

Appeals.[4] This new forum, coupled with §§ 279 (b), 274(a) and 308(a) of the 1924 Revenue Act, provided some respite for the dissatisfied deficient taxpayer in the non-jeopardy situation. (All three of the above-recited 1924 sections required the I.R.S. to send the normal deficient taxpayer a deficiency notice.) The power of the Service was still unaffected, however, in cases in which it believed the assessment or collection of a deficiency would be jeopardized by delay. In these situations, §§ 274(d) and 308(d) allowed the Service immediately to assess the tax and to demand immediate payment thereof without affording the taxpayer notice of the deficiency. In these circumstances, the only way in which the jeopardy assessment taxpayer could be heard by the Board of Tax Appeals was by filing a claim of abatement and posting a bond under §§ 279(a), (b) and 312(a), (b). If the taxpayer was unable to post a bond, his only remedy was then to pay the tax and later sue for a refund. Nevertheless, the salient features of the Revenue Act of 1924—(1) creation of the Board of Tax Appeals and (2) requirement of a deficiency notice to the non-jeopardy deficiency taxpayer—clearly established that Congress had made efforts to mitigate the harsh pay-first, litigate-later rule in its application to the non-jeopardy deficient taxpayer.

These rights and remedies, previously granted to the non-jeopardy deficient taxpayer only, were extended to the jeopardy income taxpayer in the Revenue Act of 1926. Whereas the jeopardy income taxpayers had been barred from the Board of Tax Appeals unless able to post a bond, the 1926 Act granted them the right to a redetermination of the jeopardy assessment by the Board of Tax Appeals after the assessment had been effectuated. Section 279(a), (b), (c) of the 1926 Act required the I.R.S. to send a no-

[4] See § 900, 1924 Revenue Act, Addendum p. 70.

tice of deficiency to the jeopardy income taxpayer within 60 days after the date of the assessment. Receipt of this notice enabled the jeopardy income taxpayer to petition for an adjudication by the Board of Tax Appeals within 60 days of the mailing of the deficiency notice under § 274(a) of the 1926 Act. The only manner in which this congressional intent, to mitigate the severity of the pay-first, litigate-later rule, can be implemented under the 1954 Code, in jeopardy assessment situations, is to require the Service to adhere strictly to the procedural mandates of subchapter A of chapter 70.

> "That procedure [§§ 279(a), (b), (c) and 274(a)] has been carried over to the present with slight changes and is now set forth in sections 6861, 6212(a) and 6213(a) of the 1954 Code." *Schreck, supra,* 301 F. Supp. at 1270; *Clark, supra,* 501 F. 2d at 122; and *Rambo, supra,* 492 F. 2d at 2064.

As indicated above, this is precisely what the relevant provisions of the 1954 Code require. Since § 6851 of the 1954 Code is clearly a jeopardy provision, then:

> "It is inconceivable . . . that Congress could have intended to have given this minimal procedural protection to jeopardy taxpayers against whom a deficiency is assessed at the end of the taxable year but not to taxpayers whose year is terminated under Sec. 6851." *Rambo, supra,* 492 F. 2d at 1064; *Clark, supra,* 501 F. 2d at 122.[5]

[5] The Service has argued in the past that it is conceivable as evidenced by the fact that § 6851 was enacted prior to § 6861, and thus the former cannot be dependent upon the latter for assessment authority. This argument was rejected in *Clark, supra,* 501 F. 2d at 120, where the court, adopting *Schreck's* rejection, held:

> "[T]he evolution of our revenue system from an unintegrated collection of separate revenue acts through two careful codifications, may well create new affiliations between long existent, but formerly disparate provisions."

Subchapter A of chapter 70 of the 1954 Code contains assessment authority in one provision only, § 6861. This section likewise requires the Service to send a deficiency notice to the jeopardy income taxpayer:

> "§ 6861. Jeopardy assessments of income, estate, and gift taxes.
>
> "(a) Authority for Making.
>
> "If the Secretary or his delegate believes that the assessment or collection of a deficiency, as defined in section 6211, will be jeopardized by delay, he shall, notwithstanding the provisions of section 6213(a), immediately assess such deficiency (together with all interest, additional amounts, and additions to the tax provided for by law), and notice and demand shall be made by the Secretary or his delegate for the payment thereof.
>
> "(b) Deficiency letters.
>
> "If the jeopardy assessment is made before any notice in respect of the tax to which the jeopardy assessment relates has been mailed under section 6212(a), then the Secretary or his delegate shall mail a notice under such subsection within 60 days after the making of the assessment."

There is nothing in this section which precludes its applicability to petitioner's situation. Further, a reading of § 6861 indicates that the Service's contentions are self-defeating. The Service does not dispute that this section applies to jeopardy taxpayers against whom a deficiency is assessed at the end of the taxable year. Significantly,

§ 6851 applies to jeopardy of "the income tax for the current *or* the preceding taxable year" (emphasis supplied). If the Service's contentions are correct, that assessments for jeopardy situations under § 6851 can be made under § 6201, then the logical result of that contention clearly contravenes obvious congressional intent:

> "[I]f we were to find the assessment authority for a § 6851 deficiency in § 6201 rather than § 6861 we would in effect invite the IRS to evade the procedural safeguards so deliberately embodied in § 6861 *by relying on § 6851 when a jeopardy situation arises.* In this way the right to Tax Court review could be totally cut off for all jeopardy situations, both § 6851 and § 6861." *Clark, supra,* 501 F. 2d at 122 (emphasis supplied).

Petitioner submits that the express language of the Code restricts the government's assessment authority, in a § 6851 jeopardy situation, to § 6861. The history of the provisions herein disputed shows a clear and reasonable congressional intent:

> "Sections 6851 and 6861 both appear in Chapter 70, Subchapter A of the Internal Revenue Code under the heading 'Jeopardy.' Since Sec. 6851 does not authorize assessment for the tax which is found due for the terminated year, it is reasonable that Congress intended that the next succeeding section in the code (Sec. 6861), entitled 'Jeopardy Assessment,' should provide that authority." *Rambo, supra,* 492 F. 2d at 1064.

Thus, the first assumption relied upon by the court in *Irving, supra,* 479 F. 2d at 24, and again in the instant case, *Laing, supra,* 496 F. 2d at 854, is without proper and sound basis and is erroneous.

C. *In a Short Year Jeopardy Assessment Pursuant to § 6851, the Thing Assessed is a Deficiency Within the Provisions of § 6211 (a) of the 1954 Code.*

> "Tax Court jurisdiction to redetermine liability prior to payment is predicated on the existence of a deficiency within the meaning of the Code. Thus the formal deficiency notice prescribed by § 6213(a) or § 6861(a) . . . in the case of a jeopardy assessment has been described as '[a] ticket to the tax court.' Corbett v. Frank, 9 Cir., 1961, 293 F. 2d 501, 502. See Mason v. Commissioner, 5 Cir., 1954, 210 F. 2d 388. The Government argues that the liability created when a tax period is terminated pursuant to § 6851 and a tax is assessed is not a 'deficiency', and therefore the taxpayer is not entitled to petition the Tax Court for a redetermination." *Clark, supra,* 501 F. 2d at 116.

In *Irving, supra,* 479 F. 2d at 24, and axiomatically in *Laing, supra,* 496 F. 2d at 854, the court held that the Service need not follow the deficiency notice requirement in a short-term jeopardy assessment situation under § 6851. The holdings are based upon pedantic adherence to *Littauer, supra,* 37 BTA at 843.

> "It is only after such annual period expires that a determination of correct tax liability can be made, and not until then can it be determined whether there is a statutory deficiency or perhaps a refund of all or part of the amount already collected under section 146 [§ 6851]. In such circumstances, the amount called a 'deficiency' in the notice sent to the petitioner here is not an amount finally determined as a deficiency, and the proceeding to contest it is at this state premature."

This reasoning was echoed in *Williamson, supra,* 31 Am. Fed. Tax. R. 2d at 73-800: "Since no return had been filed at the date of the assessment, no deficiency was determinable."

Petitioner submits that the court should not have relied upon this specious logic in that it is based upon a misinterpretation of the term "deficiency" and a failure to recognize the existence of certain provisions of the 1954 Code as well as interpretive regulations promulgated by the Service.

Section 6211(a) of the 1964 Code[6] defines deficiency as the amount by which the tax imposed exceeds the amount shown as the tax by the taxpayer on his return. The court below, in both *Irving* and *Laing,* did not mention § 443(a)(3). That section, entitled "Returns for a period of less than 12 months" states, in pertinent part:

> "(a) Returns for short period.
>
> "A return for a period of less than 12 months (referred to in this section as 'short period') shall be made under any of the following circumstances:
>
> . . . . . .

[6] Section 6211(a), entitled "Definition of a deficiency," provides:

> "(a) In general.
>
> "For purposes of this title in the case of income, estate, gift and excise taxes, imposed by subtitles A and B, chapter 42, the term 'deficiency' means the amount by which the tax imposed by subtitles A or B or chapter 42 exceeds the excess of—
>
> "(1) the sum of
>
> "(A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus
>
> "(B) the amounts previously assessed (or collected without assessment) as a deficiency, over—
>
> (2) the amount of rebates, as defined in subsection (b)(2), made."

> (3) Termination of taxable year for jeopardy.
>
> "When the Secretary or his delegate terminates the taxpayer's taxable year under section 6851 (relating to tax in jeopardy)." See also, § 6011.[7]

Statutory use of the word "shall" leaves no doubt as to the duty of the Secretary when the taxable year is terminated due to jeopardy. "Sec. 443(a)(3) of the 1954 Code requires a return to be filed when the secretary terminates the taxable year under Sec. 6851." *Rambo, supra,* 492 F. 2d at 1064. Of equal import is § 6020(b) which again mandates the Secretary to make a return on behalf of the taxpayer when "any person fails to make any return . . . required . . . therefor, or makes, wilfully or otherwise, a false or fraudulent return."[8]

The existence of these provisions, §§ 443(a)(3), 6011, and 6020(b), indicates that Congress positively contemplated that a return would be filed when the I.R.S. terminated a taxpayer's taxable year under § 6851. These provisions also support the assertion that Congress likewise contemplated that a "deficiency" could be determined readily on the basis of the difference between the amount of the tax imposed and the amount shown as the tax on the taxpayer's return.

Contrary to the court's holding below, the absence of a tax return does not mean that "no deficiency was determinable." Pursuant to § 6211(a)(1), the I.R.S. promulgated Treasury Regulation § 301.6211-1(a) which states in plain, clear and unequivocal language:

[7] Addendum, p. 48.

[8] Section 6020(b) further provides:

> "(2) Status of returns.
>
> "Any return so made and subscribed by the Secretary or his delegate shall be prima facie good and sufficient for all legal purposes."

> "If no return is made, or if the return . . . does not show any tax, for the purpose of the definition 'the amount shown as the tax by the taxpayer upon his return' shall be considered as zero. Accordingly, in any such case, if no deficiencies with respect to the tax have been made, *the deficiency is the amount of the tax imposed* by subtitle A, Chapter 11, or chapter 12 [income, estate or gift tax laws.]." See also: *Rambo, supra,* 492 F. 2d at 1164; *Clark, supra,* 501 F. 2d at 120.

The logic of this interpretation of § 6211(a) is supported and demonstrated by the facts of the case at bar. On June 29, 1972, the I.R.S. sent petitioner a correspondence informing him that his taxable year, 1972, had been terminated and a tax of $195,985.55, for the period of January 1, 1972, through June 24, 1972, was assessed and made payable. *Laing* v. *United States,* 364 F. Supp. 469, 471 (D.Vt. 1973). At this point, petitioner was clearly indebted to the United States Government. And, by his earlier action at Derby, Vermont, where he refused both to acknowledge his alleged tax liability and to pay it (A. 18-19), he was unmistakably and unequivocally denying any tax obligation to the United States. Hence, from his denial of the alleged tax liability, it was reasonable for the Service to conclude that petitioner claimed no tax liability to the government. Therefore, the "deficiency" according to Regulations, § 301.6211-1(a), is the amount by which the tax imposed, $195,985.55, exceeds the amount which the taxpayer claims he owes, zero.

> "The letter which Rambo received from the District Director of the Internal Revenue Service stated: 'I declare the taxable period 1-1-72 thru 4-24-72 immediately terminated and the income tax for such period immediately due and payable.' The letter went on

> to state that any part of the $28,488.88 which was unpaid would be immediately assessed against Rambo, as it in fact was. Clearly, the I.R.S. has imposed a tax and just as clearly the taxpayer has denied that he owes that amount by refusing either to pay the imposed tax or to file a return. Consequently, the tax imposed, $28,446.88, became the deficiency. *See* Schreck v. United States, *supra.*" *Rambo, supra,* 492 F. 2d at 1064.

Additionally, seizure of the taxpayer's property in satisfaction of the alleged tax is conclusive proof of his denial of any tax liability. This was noted by the court in *Shapiro* v. *Secretary of State,* 499 F. 2d 527, 531 (D.C. Cir. 1974):

> "Moreover, '[i]f the Secretary [of the Treasury] or his delegate makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary or his delegate and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.' [12] ([12] Int. Rev. Code § 6331(a). Levy and Distraint, Authority of Secretary or Delegate. It should be noted that section 6331(a) requires that the Commissioner provide a taxpayer prior notice of the demand for payment. The power to levy is inoperative until the subsequent 'failure or refusal' of the taxpayer to pay the required amount.)" (Footnote in parentheses.)

The liability created under § 6851 is the same type of "thing" as a deficiency, defined by § 6211. The court's assumption, that the "thing" assessed is not a deficiency, is based upon a distinction that is artificial, insignificant and erroneous.

D. *The Assessment in a Jeopardy Situation under § 6851 Constitutes an Imposed Tax.*

In *Williamson, supra,* 31 Am. Fed. Tax R. 2d at 73-800, the court concluded:

> "The assessment in this case was not an imposed tax, but merely an amount which the IRS believed justified the termination of the taxable year."

Irving, supra, 479 F. 2d at 24, and *Laing, supra,* 496 F. 2d at 854, adhered to this ruling. In short, the court "viewed this event not as the final imposition of a tax but rather as a type of mandatorily imposed bond to ensure payment at the end of the normal taxable period." *Clark, supra,* 501 F. 2d at 118. Several provisions of the Code, however, demonstrate the fallaciousness of this conclusion.

Section 6851 states that the tax due under its provisions "become[s] immediately due and payable." This phrase does not suggest that the taxes are paid merely to secure a future debt; rather, they are paid to meet an immediate obligation to the United States Government. Secondly, as indicated earlier, § 443(a)(3) requires a tax return to be filed in jeopardy proceedings under § 6851. This indicates that Congress regarded a short term jeopardy assessment, under § 6851, as a final imposition of a tax for the shortened period. Thirdly, § 441(b)(3) clearly establishes that a "taxable year" can be a period consisting of less than 12 months, for that section states, in pertinent part:

> "(b) Taxable year.—
>
> "For purposes of this subtitle, the term 'taxable year' means—
>
> . . . . . .

> "(3) the period for which the return is made, if a return is made for a period of less than 12 months."

Had a return been filed in the instant case, either by the petitioner under § 443(a)(3) or by the Secretary on behalf of the taxpayer under § 6020, there would be no question that a tax had been imposed. *Williamson, supra,* 31 Am. Fed. Tax R. 2d at 73-800; *Littauer, supra,* 37 BTA at 843. The fact that the taxpayer has not met his obligation under § 443(a)(3), or the Service its obligation under § 6020(b), does not detract from the fact that the $195,985.55 amount is a tax imposed. If anything, the only conclusion that can be drawn from the fact that a return was not filed is that one of the two needed factors to determine the existence of a deficiency does not exist. But even this conclusion is without basis, for, as indicated above, if no return is filed for purposes of the definition of deficiency "the amount shown as the tax by the taxpayer upon his return shall be considered as zero." See: § 301.611-1(a), Internal Revenue Regulations. In short, the concept of "an imposed tax" is different in nature from the concept of "tax return." The failure to file a tax return has nothing to do with whether a tax has been imposed. Thus, the holdings of *Irving* and *Laing*, that the assessment was not an imposed tax, but merely an amount justifying termination of the taxable year, are patently incorrect.

A tax was imposed because, after receipt of the assessment, the taxpayer was indebted, as distinguished from being potentially indebted, to pay a tax to the United States Government which he was not obligated to pay the day before he received his assessment.

> "In short, where the day before he literally did not then owe a tax, he is on receipt of this demand required to pay *more* than what he was (the day be-

fore) obligated to do." (Emphasis in original.) *Clark, supra,* 501 F. 2d at 117-118.

This reasoning in *Clark* is further supported by § 6851(b) which allows the taxpayer or the Secretary to *reopen* the taxpayer's taxable year. This provision allows either the taxpayer or the Service to adjust the tax liability *actually determined,* as opposed to the tax liability potentially due, for the shortened period by reopening the taxable year.

All these factors[9] lead to the conclusion that a tax was clearly imposed irrespective of whether a return was filed. The imposition by the Service of an obligation not previously owed constitutes a tax imposed and the denial of that obligation by the taxpayer creates the additional factor which is subtracted from the imposed obligation to equal the deficiency. The following statement of the *Clark* court, *supra,* 501 F. 2d at 118, relative to whether the "thing" is a deficiency, is of equal import relative to whether the assessment is an imposed tax:

> "Although perhaps not legally significant, it is almost certain that the taxpayer who receives a letter terminating his tax year, assessing a tax in excess of his existing assets and demanding immediate payment of the alleged taxes due, and then shortly discovers that all of his existing assets have been seized, would find neither comfort nor reason in the IRS's explanation that the opportunity for prompt adjudication of the alleged liability is precluded because the 'thing' which has been assessed is not technically a deficiency."

[9] (a) The tax was immediately due and payable, § 6851; (b) the taxpayer was required to file a tax return, § 443(a)(3), or the Service was required to do so on the taxpayer's behalf, § 6020(b); (c) the amount of the assessment clearly would have been a tax imposed had the taxpayer or the Service in fact filed a return; and (d) the taxpayer or the Service can reopen the taxpayer's shortened period and make an adjustment thereto, § 6851(b).

Moreover, § 6211(a) in no way limits the definition of a deficiency, as suggested by the court below, *Laing, supra,* 496 F. 2d at 854, to a determination made only at the conclusion of the full taxable year. See: §§ 441(a)(3), 443(a)(3), 6020(b), 6211 and 6851. This fact was recently recognized by the Tax Court in *Nino Sanzogno* v. *Commissioner of Internal Revenue*, 60 T.C. 321, 325 (1973). Sanzogno, an opera maestro from Italy, earned approximately $8,000 during a week's performance in Chicago in 1965. Upon his departure to return to Italy, the IRS terminated his tax period, under § 6851(a), and required him to obtain his "sailing permit" pursuant to § 6851(d), by filing a form 1040C, a Departing Alien Income Tax Return. Sanzogno filed the form and departed. Three years later he received a notice of deficiency relative to his 1965 income. In contesting the alleged deficiency the maestro argued that by filing the form 1040C he had filed a return within the meaning of § 6501, entitled "Limitations on Assessment and Collection," and thus the statutory three-year limitation had expired and precluded the government from acting. The government argued that the form 1040C did not constitute a final return; rather, the maestro should have filed a form 1040B, at the close of his normal tax year, in order to trigger the statute of limitations. In rejecting the government's contentions, the court stressed that the Service itself had terminated the maestro's taxable year:

> "The taxable year of petitioner ended on October 19, 1965, the date that the district director terminated it. . . . Respondent argues that the taxable year is the calendar year 1965 because petitioner could have returned to the United States and earned additional income before December 31. If that had occurred, the district director could have reopened the taxable year of petitioner." *Sanzogno, supra,* 60 T.C. at 325.

This holding establishes that a taxable year is not of necessity co-terminus with the calendar year and implies that the assessment by the district director constitutes a tax imposed.

Noting that the opinion was not in harmony with *Littauer, supra,* Simpson, J., filed a concurring opinion directed at that point:

> "I wholly agree with the results reached by the majority. In my opinion, such results are inconsistent with the rationale of this Court's opinion in Ludwig Littauer & Co., 37 BTA 840 (1938), but in my judgment, that rationale should no longer be followed. See, Schreck v. United States, 301 F. Supp. 1265 (D. Md. 1969); see also, Rambo v. United States, 353 F. Supp. 1021 (W. D. Ky., 1972); Clark v. Campbell, 341 F. Supp. 171 (N.D. Tex., 1972). Compare Williamson v. United States, an unreported case, (N.D. Ill., 1969, 24 A.F.T.F. 2d 69-5561, 69-2 U.S.T.C. par. 9681)."

Petitioner submits that the assessment was an imposed tax because a deficiency was clearly determinable:

> "Thus the Tax Court now appears [from the *Sanzogno* holding] to recognize that from the taxpayer's standpoint a § 6851 quick termination brings the tax period to a close and creates a liability not unlike that which would exist at the close of the normal tax period. Such an interpretation supports the conclusion that the tax liability created subsequent to a § 6851 quick termination falls within the Codal definition of deficiency as amplified by the regulations." *Clark, supra* 501 F. 2d at 119.

Therefore, the third assumption upon which the *Irving, supra,* 479 F. 2d at 24, and *Laing, supra,* 496 F. 2d at 584, holdings are based is erroneous.

E. *Conclusion.*

In arguing against the three-fold foundation of *Irving* and *Laing,* petitioner has relied upon *Schreck, Rambo* and *Clark, supra.* Just as *Williamson* and *Irving* follow *Littauer, Rambo* and *Clark* follow *Schreck.* Thus, this dichotomy is in reality caused by *Littauer* and *Schreck.*

The *Schreck* position, which is indeed petitioner's, is based upon a review of the Internal Revenue Code of 1954 in its entirety, with solid support from a study of congressional intent. It is submitted that the *Littauer* position should no longer be of force as it conflicts not only with statutory language but with "compelling policies which vitiate against the vitality of that holding." See: *Schreck, supra,* 301 F. 2d at 1278. Since petitioner's dispute was resolved on the basis of *Littauer,* it is submitted that it was erroneously decided.

II. The Procedures Employed by the Service Pursuant to its Interpretation of the Internal Revenue Code of 1954 Violate the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

A. *Introduction.*

If the Code were interpreted as the Service suggests significant constitutional problems would arise:

> First, because the procedure followed by the Service does not permit a prompt post-seizure hearing following the seizure of the taxpayer's property, the procedure is violative of the requirements of due process; for there exists no compelling governmental interest to justify the long delay between the seizure of the taxpayer's property and his first opportunity to appear before a judicial forum. *Phillips* v. *Commis-*

sioner of Internal Revenue, 283 U.S. 589, 51 S.Ct. 608 (1931); *Fuentes* v. *Shevin,* 407 U.S. 67, 92 S.Ct. 1983 (1972); *Goldberg* v. *Kelly,* 397 U.S. 254, 90 S.Ct. 1011 (1970); *Sniadach* v. *Family Finance Corp. of Bay View,* 395 U.S. 337, 89 S.Ct. 1820 (1969).

Second, the procedure followed by the Service circumvents the procedural safeguards available to other jeopardy income taxpayers and thus makes it possible for the taxpayer's property to be disposed of without due process of law. See, *Rambo, supra,* 492 F. 2d at 1064-1065.

While it has been held that the summary assessment and collection procedure for collecting the internal revenue of the United States is constitutionally permissible, *Phillips, supra,* 283 U.S. 589, 51 S.Ct. 608 (1931), this procedure has been justified on the basis that the taxpayer has adequate *post*-seizure access to the courts.

> "The right of the United States to collect its internal revenue by summary administrative proceedings has long been settled. Where, as here, *adequate opportunity* is afforded for a later judicial determination of the legal rights, summary proceedings to secure prompt performance of pecuniary obligations to the government have been consistently sustained." *Phillips, supra,* 283 U.S. at 595, 51 S.Ct. at 611. (Emphasis supplied.)

The procedure followed by the Service in the instant case and accepted by the court below in *Irving, supra,* 497 F. 2d at 24, and in *Laing, supra,* 496 F. 2d at 854, limits the taxpayer's access to a judicial forum for a refund suit which cannot be commenced until at least "six months

after filing" his full year tax return.[10] *Irving, supra,* 479 F. 2d at 24. The necessity for the taxpayer to endure this tremendous delay between summary assessment and seizure under § 6851 and access to a judicial forum to contest the Service's actions renders this procedure violative of the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. See *Phillips,*

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[10] 26 U.S.C. § 7422. Civil actions for refund.

"(a) No suit prior to filing claim for refund.

"No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof.

26 U.S.C.A. § 6532. Periods of limitation on suits.

"(a) Suits by taxpayers for refund.

"(1) General rule.

"No suit or proceeding under section 7422(a) for the recovery of any internal revenue tax, penalty, or other sum, shall be begun before the expiration of 6 months from the date of filing the claim required under such section unless the Secretary or his delegate renders a decision thereon within that time, nor after the expiration of 2 years from the date of mailing by certified mail or registered mail by the Secretary or his delegate to the taxpayer of a notice of the disallowance of the part of the claim to which the suit or proceeding relates.

These two provisions are the basis for the court's statement in *Irving, supra,* 479 F. 2d at 24, that a refund suit cannot be commenced until 6 months after the filing of a full year's tax return.

The inadequacy of this remedy is fully discussed in *Schreck, supra,* 301 F. Supp. at 1279-1280; see also, *Rambo, supra,* 492 F. 2d at 1062; *Clark, supra,* 501 F. 2d at 123; and will not be rediscussed here.

supra, 283 U.S. 589, 51 S.Ct. 608 (1931); *Fuentes, supra*, 407 U.S. 67, 92 S.Ct. 1983 (1972); *Goldberg, supra*, 397 U.S. 254, 90 S.Ct. 1011 (1970); *Sniadach, supra*, 395 U.S. 337, 89 S.Ct. 1820 (1969).

B. *An Opportunity for a Hearing Must be Granted to the Taxpayer at a Meaningful Time and in a Meaningful Manner.*

To be sure, *Phillips* was recently cited with approval by this court in *Fuentes, supra*, 407 U.S. at 72, 92 S.Ct. at 1999-2000. However, *Phillips, supra*, as indicated above, was predicated on the fact that the taxpayer was afforded an immediate post-seizure opportunity to contest the government's actions. This fact was reaffirmed in *Fuentes, supra*. For, in *Fuentes, supra*, 407 U.S. at 90, 92, S.Ct. at 1999, the court balances the "postponement" of judicial access against the situation requiring it to determine if the need is "truly unusual."

> "There are 'extraordinary situations' that justify postponing notice and opportunity for a hearing . . . . These situations, however, must be truly unusual."

By recognizing the need to postpone a judicial hearing in a "truly unusual" situation, this court was not suggesting that the hearing be postponed for an egregious length of time, in the absence of a compelling governmental interest. This conclusion is supported by this court's statement that:

> "It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.' *Armstrong* v. *Manzo*, 380 U.S. 545, 552." *Fuentes, supra*, 407 U.S. at 80, 92 S.Ct. at 1994.

A similar balancing of interest was performed by this court in *Goldberg, supra*, 397 U.S. at 262-263, where the court observed:

> "The extent to which procedural due process must be afforded the recipient [here, the taxpayer] is influenced by the extent to which he may be 'condemned to suffer grievous loss,' *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 168 [71 S.Ct. 624, 647, 95 L. Ed. 817] (1951) (Frankfurter, J., concurring), and depends upon whether the recipient's [taxpayer's] interest in avoiding that loss outweighs the governmental interest in summary adjudication. Accordingly, as we said in *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886, 895 [81 S.Ct. 1743, 1748-1749, 6 L. Ed. 2d 1230] (1961), 'consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.' See also *Hannah* v. *Larche*, 363 U.S. 420, 440, 442 [80 S.Ct. 1502, 1513, 1514, 4 L. Ed. 2d 1307] (1960)."

Since the only "truly unusual" circumstance, according to the Service, is its need immediately to collect the internal revenue, there is no justification for unnecessarily prolonging the taxpayer's access to a judicial forum once the revenue is collected. Yet, the procedure followed by the Service in the instant case does precisely that; that is, it totally ignores this balancing of interest by restricting the taxpayer's access to a judicial forum for a refund suit, thereby prolonging his "grievous loss" for absolutely no compelling governmental interest. All other jeopardy income taxpayers are afforded a prompt post-seizure opportunity for litigation in the Tax Court. *Schreck, supra*, 301 F. Supp. at 1280.

1. The Taxpayer's Hardship.

> "The consequences of a jeopardy assessment almost always results in an unalterable change of situation for the individual taxpayer. Jeopardy assessments are most often levied upon those whose assets allegedly do not cover their liabilities, and they may result in the freezing of assets with the following effect: Real threat to the assets continued existence, prevention of posting of the necessary bond, impossibility of adequate defense, and eventual loss of the property at a forced sale." Comment, *Jeopardy Assessment, The Sovereign's Stranglehold*, 55 Georgetown L. J. 701. 726 (1967).

The "grievous loss" suffered by petitioner in the case at bar is readily apparent. First, petitioner had approximately $310,000 of his funds seized.[11] It is inconceivable that

[11] Although the following information is not part of the record, petitioner respectfully requests this Court to take judicial notice of the following information as it removes any question as to the Service's position with respect to petitioner's interest in the seized funds. Petitioner made a similar request of the Second Circuit Court of Appeals in the proceeding below.

On March 1, 1973, petitioner filed a claim for refund with the Internal Revenue Service for $114,014.45 (the difference between $310,000 and the tax of $195,985.55 assessed against petitioner on June 24, 1972). This claim for refund was denied by the Internal Revenue Service on March 9, 1973, for the following reason:

> "Claim for refund of $114,014.45 is based on the ground that since the taxpayer paid estimated taxes of $310,000.00 on his return for the period of January 1, 1972 to June 24, 1972; and since the tax liability for this period is $195,985.55, the difference of $114,014.45 is due the taxpayer.
>
> "The claim for refund is disallowed in full since there is no overpayment on taxpayer's short-period return beginning January 1, 1972 and ending June 24, 1972 because the amount paid on the tax liability is $100,100.00 in lieu of the $ 310,000.00 claimed as paid; and, further, it has not been established that any funds applied in excess of $100,100.00 are solely the property of the taxpayer."

even the wealthiest person would not regard the loss of such sum of money as a hardship. Additionally, petitioner is a citizen of New Zealand who currently resides in Wales. In order fully to pursue his legal rights, he is now required not only to endure the absence of his funds until after the full taxable year but also to commence both a refund suit, and, if he intends to seek a refund of all of his funds, costly litigation to establish his ownership of all of his funds seized. Such litigation will clearly be costly both in time and in money. It will undoubtedly require trips back and forth across the Atlantic for depositions and court appearances. Moreover, even if petitioner follows the court's pronouncement in *Irving, supra,* 479 F. 2d at 24, and waits before filing the refund suit until six months after filing his full year's tax return, it is not likely that he will receive a hearing on the merits of the suit for another three to six months. During all of this period, of course, the government's interest will be fully protected while the financial hardship occasioned upon the taxpayer by the procedure followed by the Service continues to mount.

2. No Compelling Governmental Interest Exists to Justify the Delay.

No justification exists for prolonging the "grievous loss" occasioned upon petitioner by the jeopardy assessment and seizure. The jeopardy assessment and seizure under § 6851 was performed because

> "[T]he Secretary or his delegate finds that a taxpayer designs quickly to depart from the United States or to remove his property therefrom, or to conceal himself or his property therein, or to do any other act tending to prejudice or to render wholly or partly ineffectual proceedings to collect the income tax for the current or the preceding taxable year unless such proceedings be brought without delay. . . ." § 6851.

Once the tax is assessed and the taxpayer's property is seized, the compelling governmental interest to secure the collection of internal revenue of the United States no longer exists. The revenue is secure. The balancing of interest then ought to shift its focus from a concern for the protection of the internal revenue of the United States to a concern for protecting the interests of the taxpayer. See, *Fuentes, supra,* 407 U.S. at 90, 92 S.Ct. at 1999; *Goldberg, supra,* 397 U.S. 254, 262-263, 90 S.Ct. 1011. Since the jeopardy assessment and seizure causes the taxpayer to endure a hardship, due process requires, at least, that the taxpayer receive an opportunity for a post-seizure hearing as promptly as possible.

> "Where the taxpayer's assets have been frozen, the only meaningful remedy is to obtain an adjudication of liability as promptly as possible. This is given to a § 6861 jeopardy taxpayer." *Clark, supra,* 501 F. 2d at 124.

The only provision contained in subchapter A of chapter 70 which provides the jeopardy income taxpayer with quicker access to a judicial forum than the procedure prescribed by the court below in *Irving, supra,* 479 F. 2d at 24, is § 6861. As indicated above, this provision requires that once the Service determines that the collection of a deficiency may be jeopardized by delay and, consequently, immediately assesses a deficiency and demands payment thereof, it (the Service) must send a deficiency notice to the taxpayer within 60 days after the assessment. *Rambo, supra,* 492 F. 2d at 1062. Following receipt of the deficiency notice, the taxpayer may petition for a redetermination of the deficiency by the Tax Court within 90 days. § 6213(a). This procedure, at least, grants the jeopardy income taxpayer an opportunity to seek a judicial determination of his legal rights within five months after the seizure of his property. As indicated above, all other jeopardy income taxpayers are afforded this opportunity; *Schreck, supra,* 301 F. Supp. at 1280; *Clark, supra,* 501 F. 2d at 124. The existence of this opportunity in no way endangers the Service's interest in collecting the internal revenue. As the court observed in *Clark, supra,* 501 F. 2d at 126:

> "We fail to see how any legitimate government interest will be prejudiced by construing the law to permit the § 6851 quick termination taxpayer to seek a redetermination in the Tax Court before his assets are involuntarily applied to the liability. The opportunity for prompt review will hardly dry up the sources of revenue or stop the Government in its tracks since virtually all other taxpayers (§ 6861 jeopardy or otherwise) who desire to contest income tax liability prior to payment are currently allowed to do so. Nor will the purpose of § 6851 and § 6861—the avoidance of tax evasion—be thwarted since the Government will still be able to seize all of the taxpayer's available assets necessary to satisfy the potential liability prior to the Tax Court proceeding."

Further, the need for speedy access to a judicial forum is underscored by the fact that the assessment in a jeopardy proceeding is a completely arbitrary act performed by the Commisioner of the I.R.S. or his delegate without prior judicial review. Wahl, John H. Jr., *The Assessment And Collection Of Federal Income Taxes,* 3 Miami L.Q. 209, 214 (1949). The possibility of overassessment is, therefore, great. Given that this awesome power is reposed in the hands of one man, every opportunity must be made to allow the taxpayer access to a judicial forum as expeditiously as possible. Access is essential both to add regularity to the Commisioner's action and to protect the rights of the tax-

payer. Concededly, courts performing post-seizure judicial review seldom examine the propriety of the assessment, *Ginsburg* v. *United States*, 278 F. 2d 470, 742 (1st Cir. 1960); *Laing, supra*, 364 F. Supp. at 473, or the Commissioner's or his delegate's motivation in making it. *Veeder* v. *Commissioner*, 36 F. 2d 342, 345 (7th Cir. 1929); *Laing, supra*, 364 F. Supp. at 473. Nonetheless, these courts do examine such questions as the legality of the particular tax, *United States* v. *Butler*, 297 U.S. 1, 56 S. Ct. 312 (1936); *Melvin Bldg. Corp.* v. *Long*, 262 F. 2d 920, 922 (7th Cir. 1959); the liability of the petitioner to pay it, *Enochs* v. *Williams Packing & Nav. Co.*, 370 U.S. 1, 28, 82 S.Ct. 1125, 1129 (1962); *Rambo* v. *United States*, 492 F. 2d at 1064 (6th Cir. 1974); *Aguilar* v. *United States*, 501 F. 2d 127 (5th Cir. 1974), the accuracy of the amount to be paid, *Clark* v. *Campbell*, 501 F. 2d 108 (5th Cir. 1974); *Lucia* v. *United States*, 474 F. 2d 565, 574 (5th Cir. 1973); *Pizzarello* v. *United States*, 408 F. 2d 579, 583-584 (2d Cir. 1969), and the possible violation of the taxpayer's constitutional rights. *Lloyd* v. *Patterson*, 242 F. 2d 742, 744 (5th Cir. 1957); *United States* v. *Brodson*, 234 F. 2d 97, 99 (7th Cir. 1956). From the taxpayer's point of view, an opportunity for an expeditious post-seizure hearing to examine even these limited questions is better than nothing; for, to him, the quicker his access to a judicial forum, the greater the likelihood of removing or mitigating his financial hardship.

Petitioner remains unconvinced, however, that even this "better-than-nothing" situation comports with the requirements of due process. See: *Sniadach, supra*, 395 U.S. at 343, 89 S. Ct. at 1823 (concurring opinion of Harlan, J.); *Goldberg, supra*, 397 U.S. at 270, 90 S. Ct. at 1021; *Fuentes, supra*, 407 U.S. at 80, 92 S. Ct. at 1994. While the petitioner concedes that, in some cases, the normal assessment procedure may indeed be too slow to protect the government's interest in collecting the internal revenue, it is equally clear

to the petitioner that there is a tremendous opportunity of abuse inherent in the present method of determining jeopardy. 55 Georgetown L.J. at 730. Indeed, in the recent case of *Willits* v. *Richardson*, 497 F. 2d 240, 246 (1974), the Fifth Circuit Court of Appeals was constrained to state:

> "The IRS has been given broad power to take possession of the property of citizens by summary means that ignore many basic tenets of pre-seizure due process in order to prevent the loss of tax revenues. Courts cannot allow these expedients to be turned on citizens suspected of wrongdoing—not as tax collection devices but as summary punishment to supplement or complement regular criminal procedures."

The same court was required to make a similar statement a few months later in *Aguilar, supra*, 501 F. 2d at 130-131.

> "On the face of the record . . . a non-resident alien who has no income from any sources in the United States whose truck and money are geographically within the United States for the purpose of purchasing legitimate commercial supplies, has money and truck taken peremptorily from him at the instance of drug law enforcers with no more than a vague suggestion that the Government 'suspected' that these strangers were trafficking in drugs. Adding to the mystery of the basis for that "suspicion' is the total—the word is total—lack of any basis for computing the quick terminated tax to be $12,774.00—almost the precise total of the money and the value of the truck—a pattern followed often in the contemporary practice where tax mechanisms are employed 'not as tax collection devices but as summary punishment to supplement or complement regular criminal procedures.'" See also, *Rinieri* v. *Scanlon*, 254 F. Supp. 469, 472-473 (S.D. N.Y. 1966);

United States v. *Bonaguro*, 294 F. Supp. 750, 753, 754 (E.D. N.Y. 1968); *Clark, supra*, 501 F. 2d at 117, fn. 28.

These cases not only illuminate the need for thorough judicial scrutiny of the Service's actions, but also strongly suggest that the quick termination procedure is being employed for purposes other than to secure the collection of the internal revenue.[12]

In view of this awesome power possessed by the I.R.S. with its inherent opportunity for abuse, "it is therefore difficult indeed to see how it is possible for a court to conclude that the decision to collect by 'jeopardy' which engenders such suppression is not subject to review." Kaminsky, Michael. *Ad. Law. Jud. Rev. of Jeop. Assessments Under the I.R.C.*, 14 Tax Law Rev. 545, 557 (1958-59). See also, 55 Georgetown L.J., *supra*, at 728-729. Yet, numerous courts have reached this conclusion.[13]

It is precisely because the power possessed by the I.R.S. is so awesome and the corresponding hardship imposed upon the taxpayer so severe, that the petitioner contends that due process, in a jeopardy proceeding, actually requires:

1. that the taxpayer have an opportunity to appear before a judicial forum as soon as practicable *after* the seizure of his property;

2. that the I.R.S. establish at least the "probable

[12] In view of the court's statement in *Willits, supra*, 497 F. 2d at 246, and the observation of the court in *Aguilar, supra*, 501 F. 2d at 130-131, regarding the basis of the Service's action, and the holding of the court in *Rinieri, supra*, 254 F. Supp. at 472-473, it is important to reiterate that petitioner was originally assessed a tax liability ($310,000) which corresponded exactly to the amount of his money seized.

[13] *Ginsburg, supra*, 278 F. 2d at 472; *Laing, supra*, 364 F. Supp. at 473; *Vecder, supra*, 36 F. 2d at 345; *Enochs, supra*, 370 U.S. at 28, 82 S. Ct. at 1129.

validity" of its jeopardy assessment, *Sniadach, supra*, 395 U.S. at 343, 89 S. Ct. at 1823;

3. that, upon the determination by the court of the probable validity of the jeopardy assessment, it then determine:

(a) the liability of the taxpayer to it;

(b) the accuracy of the amount to be paid; and

(c) the violation of any collateral constitutional rights.

In any case, the procedure followed by the I.R.S. in the case at bar violates due process because it is *totally devoid* of any notion of a "prompt" post-seizure hearing while simultaneously no governmental interests exists to justify the unnecessarily long delay between the jeopardy assessment and seizure and the taxpayer's opportunity to appear before a judicial forum. See, *Phillips, supra*, 283 U.S. at 598, 51 S. Ct. at 612; *Goldburg, supra*, 397 U.S. at 262-263, 90 S. Ct. 1011; *Sniadach, supra*, 395 U.S. at 343, 89 S. Ct. at 1823. Therefore, the procedure followed by the Service in the instant case violates due process because it fails to provide the taxpayer with an opportunity to be heard "at a meaningful time and in a meaningful manner." *Fuentes, supra*, 407 U.S. at 80, 92 S.Ct. at 1994.

C. *A Taxpayer's Property Cannot be Disposed of Without Due Process of Law.*

"A system that permits the government to seize and sell property without affording the taxpayer any opportunity for a judicial determination of the validity of the tax prior to payment could very well raise a serious question of a denial to the taxpayer of his property without due process of law. *Cf. Fuentes* v. *Shevin*, 407 U.S. 67, 92 S. Ct. 1983, 1999, 32 L. Ed. 2d 556 (1972),

and *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337, 89 S. Ct. 1820, 23 L. Ed. 2d 349 (1969)." *Rambo, supra,* 492 F. 2d at 1065.

The Service's interpretation of § 6851 results in a denial of due process because under its interpretation a taxpayer's property can be disposed of before the taxpayer receives access to a judicial forum. See § 6331(a) & (b), entitled "Levy and distraint."[14]

As noted throughout this brief, subchapter A of chapter 70 creates only two types of jeopardy situations. See, §§ 6851 and 6861. Jeopardy income taxpayers under § 6861 are entitled to due process protections. See § 6863 (Stay of collection of jeopardy assessments).[15] The Service's contention leads to the conclusion that jeopardy income taxpayers under § 6851 would not be entitled to these due process protections. See *Rambo, supra,* 492 F. 2d at 1064. Justification or support for this distinction between jeopardy income taxpayers under § 6851 and jeopardy income taxpayers under § 6861 can be found nowhere in the Code. Moreover, if the Service's contention were to prevail no jeopardy income taxpayer would necessarily be entitled to these due process protections

> ' [I]f we were to find the assessment authority for a § 6851 deficiency in § 6201 rather than in § 6861 we would in effect invite the IRS to evade the procedural safeguards so deliberately embodied in § 6861 by relying on § 6851 when a jeopardy situation arises. In this way the right to Tax Court review could be totally cut off for all jeopardy situations, both § 6851 and § 6861." *Clark, supra,* 501 F. 2d at 122.

[14] Addendum, p. 52.

[15] Addendum, p. 61-62.

The Service's contention that it alone can decide who shall and who shall not be afforded due process guarantees is abhorrent to the most basic and fundamental notions of an orderly system of liberties. *Sniadach, supra,* 395 U.S. 337, 89 S.Ct. 1820; *Fuentes, supra,* 407 U.S. 67, 92 S.Ct 1983.

Conclusion.

For the reasons discussed above, petitioner respectfully requests that this Court reverse the decision of the court below affirming the dismissal of his complaint and order that an injunction issue pursuant to § 6213(a) restraining the government from continuing in its possession of petitioner's property.

Respectfully submitted,

JOSEPH S. OTERI,
RUDOLPH F. PIERCE,
CHARLOTTE A. PERRETTA,
MARTIN G. WEINBERG,
CRANE. INKER, & OTERI.

Addendum.

26 U.S.C.

SEC. 441. PERIOD FOR COMPUTATION OF TAXABLE INCOME.

[Sec. 441(a)]

(a) COMPUTATION OF TAXABLE INCOME.—Taxable income shall be computed on the basis of the taxpayers' taxable year.

[Sec. 441(b)]

(b) TAXABLE YEAR.—For purposes of this subtitle, the term, "taxable year" means—

(1) the taxpayer's annual accounting period, if it is a calendar year or a fiscal year;

(2) the calendar year, if subsection (g) applies; or

(3) the period for which the return is made, if a return is made for a period of less than 12 months.

SEC. 443. RETURNS FOR A PERIOD OF LESS THAN 12 MONTHS.

[Sec. 443(a)]

(a) RETURNS FOR SHORT PERIOD.—A return for a period of less than 12 months (referred to in this section as "short period") shall be made under any of the following circumstances:

(1) CHANGE OF ANNUAL ACCOUNTING PERIOD.—When the taxpayer, with the approval of the Secretary or his delegate, changes his annual accounting period. In such a case, the return shall be made for the short period beginning on the day after the close of the former taxable year and ending at the close of the day before the day designated as the first day of the new taxable year.

(2) TAXPAYER NOT IN EXISTENCE FOR ENTIRE TAXABLE YEAR.—When the taxpayer is in existence during only part of what would otherwise be his taxable year.

(3) TERMINATION OF TAXABLE YEAR FOR JEOPARDY.—When the Secretary or his delegate terminates the taxpayer's taxable year under section 6851 (relating to tax in jeopardy).

SEC. 6011. GENERAL REQUIREMENT OF RETURN, STATEMENT, OR LIST.

[Sec. 6011(a)]

(a) GENERAL RULE.—When required by regulations prescribed by the Secretary or his delegate any person made liable for any tax imposed by this title, or for the collection thereof, shall make a return or statement according to the forms and regulations prescribed by the Secretary or his delegate. Every person required to make are a return or statement shall include therein the information required by such forms or regulations.

SEC. 6020. RETURNS PREPARED FOR OR EXECUTED BY SECRETARY.

[Sec. 6020(a)]

(a) PREPARATION OF RETURN BY SECRETARY.—If any person shall fail to make a return required by this title or by regulations prescribed thereunder, but shall consent to disclose all information necessary for the preparation thereof, then, and in that case, the Secretary or his delegate may prepare such return, which, being signed by such person, may be received by the Secretary or his delegate as the return of such person.

[Sec. 6020(b)]

(b) EXECUTION OF RETURN BY SECRETARY.—

(1) AUTHORITY OF SECRETARY TO EXECUTE RETURN.—If any person fails to make any return (other than a declaration of estimated tax required under section 6015) required by any internal revenue law or regulation made thereunder at the time prescribed therefor, or makes, willfully or otherwise, a false or fraudulent return, the Secretary or his delegate shall make such return from his own knowledge and from such information as he can obtain through testimony or otherwise.

(2) STATUS OF RETURNS.—Any return so made and subscribed by the Secretary or his delegate shall be prima facie good and sufficient for all legal purposes.

SEC. 6201. ASSESSMENT AUTHORITY.

[Sec. 6201(a)]

(a) AUTHORITY OF SECRETARY OR DELEGATE.—The Secretary or his delegate is authorized and required to make the inquiries, determinations, and assessments of all taxes (including interest, additional amounts, additions to the tax, and assessable penalties) imposed by this title, or accruing under any former internal revenue law, which have not been duly paid by stamp at the time and in the manner provided by law. Such authority shall extend to and include the following:

(1) TAXES SHOWN ON RETURN.—The Secretary or his delegate shall assess all taxes determined by the taxpayer or by the Secretary or his delegate as to which returns or lists are made under this title.

. . . . . .

[Sec. 6201(d)]

(d) DEFICIENCY PROCEEDINGS.—

For special rules applicable to deficiencies of income, estate, gift, and chapter 42 taxes, see subchapter B.

SEC. 6211. DEFINITION OF A DEFICIENCY.

(a) IN GENERAL.—For purposes of this title in the case of income, estate, gift, and excise taxes, imposed by subtitles A and B, and chapter 42, the term "deficiency" means the amount by which the tax imposed by subtitle A or B or chapter 42 exceeds the excess of—

(1) the sum of

(A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus

(B) the amounts previously assessed (or collected without assessment) as a deficiency, over—

(2) the amount of rebates, as defined in subsection (b)(2), made.

SEC. 6212. NOTICE OF DEFICIENCY.

[Sec. 6212(a)]

(a) IN GENERAL.—If the Secretary or his delegate determines that there is a deficiency in respect of any tax imposed by subtitle A or B or chapter 42, he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.

[Sec. 6212(c)]

(c) FURTHER DEFICIENCY LETTERS RESTRICTED.—

(1) GENERAL RULE.—If the Secretary or his delegate has mailed to the taxpayer a notice of deficiency as provided

in subsection (a), and the taxpayer files a petition with the Tax Court within the time prescribed in section 6213(a), the Secretary or his delegate shall have no right to determine any additional deficiency of income tax for the same taxable year, of gift tax for the same calendar quarter, of estate tax in respect of the taxable estate of the same decedent, of section 4940 tax for the same taxable year, or of chapter 42 tax (other than under section 4940) with respect to any act (or failure to act) to which such petition relates, except in the case of fraud, and except as provided in section 6214(a) (relating to assertion of greater deficiences before the Tax Court), in section 6213(b)(1) (relating to mathematical errors), or in section 6861(c) (relating to the making of jeopardy assessments).

(2) CROSS REFERENCES.—

For assessment as a deficiency notwithstanding the prohibition of further deficiency letters, in the case of—

(A) Deficiency attributable to change of election with respect to the standard deduction where taxpayer and his spouse made separate returns, see section 144(b).

(B) Deficiency attributable to gain on involuntary conversion, see section 1033(a)(3)(C) and (D).

(C) Deficiency attributable to gain on sale or exchange of personal residence, see section 1034(j).

(D) Deficiency attributable to war loss recoveries where prior benefit rule is elected, see section 1335.

SEC. 6213. RESTRICTIONS APPLICABLE TO DEFICIENCIES; PETITION TO TAX COURT.

(a) TIME FOR FILING PETITION AND RESTRICTION ON ASSESSMENT.—Within 90 days, or 150 days if the notice is ad-

dressed to a person outside the States of the Union and the District of Columbia, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B or chapter 42 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

[Sec. 6213(b)]

(b) EXCEPTIONS TO RESTRICTIONS ON ASSESSMENT.—

(1) MATHEMATICAL ERRORS.—If the taxpayer is notified that, on account of a mathematical error appearing upon the return, an amount of tax in excess of that shown upon the return is due, and that an assessment of the tax has been or will be made on the basis of what would have been the correct amount of tax but for the mathematical error, such notice shall not be considered as a notice of deficiency for the purposes of subsection (a) (prohibiting assessment and collection until notice of the deficiency has been mailed), or of section 6212(c)(1) (restricting further deficiency letters), or section 6512(a) (prohibiting credits or refunds after petition to the Tax Court), and the taxpayer shall have no right to file a petition with the Tax Court based

on such notice, nor shall such assessment or collection be prohibited by the provisions of subsection (a) of this section.

(2) ASSESSMENT ARISING OUT OF TENTATIVE CARRYBACK ADJUSTMENTS.—If the Secretary or his delegate determines that the amount applied, credited, or refunded under section 6411 is in excess of the overassessment attributable to the carryback with respect to which such amount was applied, credited, or refunded, he may assess the amount of the excess as a deficiency as if it were due to a mathematical error appearing on the return.

(3) ASSESSMENT OF AMOUNT PAID.—Any amount paid as a tax or in respect of a tax may be assessed upon the receipt of such payment notwithstanding the provisions of subsection (a). In any case where such amount is paid after the mailing of a notice of deficiency under section 6212, such payment shall not deprive the Tax Court of jurisdiction over such deficiency determined under section 6211 without regard to such assessment.

[Sec. 6213(c)]

(c) FAILURE TO FILE PETITION.—If the taxpayer does not file a petition with the Tax Court within the time prescribed in subsection (a), the deficiency, notice of which has been mailed to the taxpayer, shall be assessed, and shall be paid upon notice and demand from the Secretary or his delegate.

[Sec. 6213(d)]

(d) WAIVER OF RESTRICTIONS.—The taxpayer shall at any time (whether or not a notice of deficiency has been issued) have the right, by a signed notice in writing filed with the Secretary or his delegate, to waive the restric-

tions provided in subsection (a) on the assessment and collection of the whole or any part of the deficiency.

[Sec. 6216]

SEC. 6216. CROSS REFERENCES.

(1) For procedures relating to bankruptcy and receivership, see subchapter B of chapter 70.

(2) For procedures relating to jeopardy assessments, see subchapter A of chapter 70.

(3) For procedures relating to claims against transferees and fiduciaries, see chapter 71.

SEC. 6331. LEVY AND DISTRAINT.

[Sec. 6331(a)]

(a) AUTHORITY OF SECRETARY OR DELEGATE.—If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient tto cover the expenses of the levy by levy) upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401(d)) of such officer, employee, or elected official. If the Secretary or his delegate makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary or his delegate and, upon failure or refusal to

pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

[Sec. 6331(b)]

(b) SEIZURE AND SALE OF PROPERTY.—The term "levy" as used in this title includes the power of distraint and seizure by any means. A levy shall extend only to property possessed and obligations existing at the time thereof. In any case in which the Secretary or his delegate may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible).

SEC. 6501. LIMITATIONS ON ASSESSMENT AND COLLECTION.

[Sec. 6501(a)]

(a) GENERAL RULE.—Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, at any time after such tax became due and before the expiration of 3 years after the date on which any part of such tax was paid, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period.

. . . . . .

[Sec. 6501(c)]

(c) EXCEPTIONS.—

(1) FALSE RETURN.—In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed,

or a proceeding in court for collection of such tax may be begun without assessment, at any time.

SEC. 6532. PERIODS OF LIMITATION ON SUITS.

(a) SUITS BY TAXPAYERS FOR REFUND.—

(1) GENERAL RULE.—No suit or proceeding under section 7422(a) for the recovery of any internal revenue tax, penalty, or other sum, shall be begun before the expiration of 6 months from the date of filing the claim required under such section unless the Secretary or his delegate renders a decision thereon within that time, nor after the expiration of 2 years from the date of mailing by certified mail or registered mail by the Secretary or his delegate to the taxpayer of a notice of the disallowance of the part of the claim to which the suit or proceeding relates.

SEC. 6851. TERMINATION OF TAXABLE YEAR.

(a) INCOME TAX IN JEOPARDY.—

(1) IN GENERAL.—If the Secretary or his delegate finds that a taxpayer designs quickly to depart from the United States or to remove his property therefrom, or to conceal himself or his property therein, or to do any other act tending to prejudice or to render wholly or partly ineffectual proceedings to collect the income tax for the current or the preceding taxable year unless such proceedings be brought without delay, the Secretary or his delegate shall declare the taxable period for such taxpayer immediately terminated, and shall cause notice of such finding and declaration to be given the taxpayer, together with a demand for immediate payment of the tax for the taxable period so declared terminated and of the tax for the preceding taxable year or so much of such tax as is unpaid, whether or not the time otherwise allowed by law for filing return and paying the tax has expired; and such taxes shall thereupon become immediately due and payable. In any proceeding in court brought to enforce payment of taxes made due and payable by virtue of the provisions of this section, the finding of the Secretary or his delegate, made as herein provided, whether made after notice to the taxpayer or not, shall be for all purposes presumptive evidence of jeopardy.

(2) CORPORATION IN LIQUIDATION.—If the Secretary or his delegate finds that the collection of the income tax of a corporation for the current or the preceding taxable year will be jeopardized by the distribution of all or a portion of the assets of such corporation in the liquidation of the whole or any part of its capital stock, the Secretary or his delegate shall declare the taxable period for such taxpayer immediately terminated and shall cause notice of such finding and declaration to be given the taxpayer, together with a demand for immediate payment of the tax for the taxable period so declared terminated and of the tax for the preceding taxable year or so much of such tax as is unpaid, whether or not the time otherwise allowed by law for filing return and paying the tax has expired; and such taxes shall thereupon become immediately due and payable.

[Sec. 6851(b)]

(b) REOPENING OF TAXABLE PERIOD.—Notwithstanding the termination of the taxable period of the taxpayer by the Secretary or his delegate, as provided in subsection (a), the Secretary or his delegate may reopen such taxable period each time the taxpayer is found by the Secretary or his delegate to have received income, within the current taxable year, since a termination of the period under subsection (a). A taxable period so terminated by the Secretary or his delegate may be reopened by the taxpayer

(other than a nonresident alien) if he files with the Secretary or his delegate a true and accurate return of the items of gross income and of the deductions and credits allowed under this title for such taxable period, together with such other information as the Secretary or his delegate may by regulations prescribe. If taxpayer is a nonresident alien the taxable period so terminated may be reopened by him if he files, or causes to be filed, with the Secretary or his delegate a true and accurate return of his total income derived from all sources within the United States, in the manner prescribed in this title.

[Sec. 6851(c)]

(c) CITIZENS.—In the case of a citizen of the United States or of a possession of the United States about to depart from the United States, the Secretary or his delegate may, at his discretion, waive any or all of the requirements placed on the taxpayer by this section.

[Sec. 6851(d)]

(d) DEPARTURE OF ALIEN.—Subject to such exceptions as may, by regulations, be prescribed by the Secretary or his delegate—

(1) No alien shall depart from the United States unless he first procures from the Secretary or his delegate a certificate that he has complied with all the obligations imposed upon him by the income tax laws.

(2) Payment of taxes shall not be enforced by any proceedings under the provisions of this section prior to the expiration of the time otherwise allowed for paying such taxes, if, in the case of an alien about to depart from the United States, the Secretary or his delegate determines that the collection of the tax will not be jeopardized by the departure of the alien.

[Sec. 6851(e)]

(e) FURNISHINGS OF BOND WHERE TAXABLE YEAR IS CLOSED BY THE SECRETARY OR HIS DELEGATE.—Payment of taxes shall not be enforced by any proceeding under the provisions of this section prior to the expiration of the time otherwise allowed for paying such taxes if the taxpayer furnishes, under regulations prescribed by the Secretary or his delegate, a bond to insure the timely making of returns with respect to, and payment of such taxes or any income or excess profits taxes for prior years.

SEC. 6861. JEOPARDY ASSESSMENTS OF INCOME, ESTATE, AND GIFT TAXES.

[Sec. 6861(a)]

(a) AUTHORITY FOR MAKING.—If the Secretary or his delegate believes that the assessment or collection of a deficiency, as defined in section 6211, will be jeopardized by delay, he shall, notwithstanding the provisions of section 6213(a), immediately assess such deficiency (together with all interest, additional amounts, and additions to the tax provided for by law), and notice and demand shall be made by the Secretary or his delegate for the payment thereof.

[Sec. 6861(b)]

(b) DEFICIENCY LETTERS—If the jeopardy assessement is made before any notice in respect of the tax to which the jeopardy assessment relates has been mailed under section 6212(a), then the Secretary or his delegate shall mail a notice under such subsection within 60 days after the making of the assessment.

[Sec. 6861(c)]

(c) AMOUNT ASSESSABLE BEFORE DECISION OF TAX COURTS—The jeopardy assessment may be made in respect

of a deficiency greater or less than that notice of which has been mailed to the taxpayer, despite the provisions of section 6212(c) prohibiting the determination of additional deficiencies, and whether or not the taxpayer has theretofore filed a petition with the Tax Court. The Secretary or his delegate may, at any time before the decision of the Tax Court is rendered, abate such assessment, or any unpaid portion thereof, to the extent that he believes the assessment to be excessive in amount. The Secretary or his delegate shall notify the Tax Court of the amount of such assessment, or abatement, if the petition is filed with the Tax Court before the making of assessment or is subsequently filed, and the Tax Court shall have jurisdiction to redetermine the entire amount of the deficiency and of all amounts assessed at the same time in connection therewith.

[Sec. 6861(d)]

(d) Amount Assessable After Decision of Tax Court.—If the jeopardy assessment is made after the decision of the Tax Court is rendered, such assessment may be made only in respect of the deficiency determined by the Tax Court in its decision.

[Sec. 6861(e)]

(e) Expiration of Right to Assess.—A jeopardy assessment may not be made after the decision of the Tax Court has become final or after after the taxpayer has filed a petition for review of the decision of the Tax Court.

[Sec. 6861(f)]

(f) Collection of Unpaid Amounts.—When the petition has been filed with the Tax Court and when the amount which should have been assessed has been determined by a decision of the Tax Court which has become final, then

any unpaid portion, the collection of which has been stayed by bond as provided in section 6863(b) shall be collected as part of the tax upon notice and demand from the Secretary or his delegate, and any remaining portion of the assessment shall be abated. If the amount already collected exceeds the amount determined as the amount which should have been assessed, such excess shall be credited or refunded to the taxpayer as provided in section 6402, without the filing of claim therefor. If the amount determined as the amount which should have been assessed is greater than the amount actually assessed, then the difference shall be assessed and shall be collected as part of the tax upon notice and demand from the Secretary or his delegate.

[Sec. 6861(g)]

(g) Abatement if Jeopardy Does Not Exist.—The Secretary or his delegate may abate the jeopardy assessment if he finds that jeopardy does not exist. Such abatement may not be made after a decision of the Tax Court in respect of the deficiency has been rendered or, if no petition is filed with the Tax Court, after the expiration of the period for filing such petition. The period of limitation on the making of assessments and levy or a proceeding in court for collection, in respect of any deficiency, shall be determined as if the jeopardy assessment so abated had not been made, except that the running of such period shall in any event be suspended for the period from the date of such jeopardy assessment until the expiration of the 10th day after the day on which such jeopardy assessment is abated.

[Sec. 6861(h)]

(h) Cross References.—

(1) For the effect of the furnishing of security for payment, see section 6863.

(2) For provision permitting immediate levy in case of jeopardy, see section 6331(a).

SEC. 6863. STAY OF COLLECTION OF JEOPARDY ASSESSMENTS.

[Sec. 6863(a)]

(a) BOND TO STAY COLLECTION.—When a jeopardy assessment has been under section 6861 of 6862, the collection of the whole or any amount of such assessment may be stayed by filing with the Secretary or his delegate, within such time as may be fixed by regulations prescribed by the Secretary or his delegate, a bond in an amount equal to the amount as to which the stay is desired, conditioned upon the payment of the amount (together with interest thereon) the collection of which is stayed, at the time at which, but for the making of the jeopardy assessment, such amount would be due. Upon the filing of the bond the collection of so much of the amount assessed as is covered by the bond shall be stayed. The taxpayer shall have the right to waive such stay at any time in respect of the whole or any part of the amount covered by the bond, and if as a result of such waiver any part of the amount covered by the bond is paid then the bond shall, at the request of the taxpayer, be proportionately reduced. If any portion of the jeopardy assessment is abated, the bond shall, at the request of the taxpayer, be proportionately reduced.

[Sec. 6863(b)]

(b) FURTHER CONDITIONS IN CASE OF INCOME, ESTATE, OR GIFT TAXES.—In the case of taxes subject to the jurisdiction of the Tax Court—

(1) PRIOR TO PETITION TO TAX COURT.—If the bond is given before the taxpayer has filed his petition under section 6213(a), the bond shall contain a further condition that if a petition is not filed within the period provided in such section, then the amount, the collection of which is stayed by the bond, will be paid on notice and demand at any time after the expiration of such period, together with interest thereon from the date of the jeopardy notice and demand to the date of notice and demand under this paragraph.

(2) EFFECT OF TAX COURT DECISION.—The bond shall be conditioned upon the payment of so much of such assessment (collection of which is stayed by the bond) as is not abated by a decision of the Tax Court which has become final. If the Tax Court determines that the amount assessed is greater than the amount which should have been assessed, then when the decision of the Tax Court is rendered the bond shall, at the request of the taxpayer, be proportionately reduced.

(3) STAY OF SALE OF SEIZED PROPERTY PENDING TAX COURT DECISION.—

(A) GENERAL RULE.—Where, notwithstanding the provisions of section 6213(a), a jeopardy assessment has been made under section 6861 the property seized for the collection of the tax shall not be sold—

(i) if section 6861(b) is applicable, prior to the issuance of the notice of deficiency and the expiration of the time provided in section 6213(a) for filing petition with the Tax Court, and

(ii) if petition is filed with the Tax Court (whether before or after the making of such jeopardy assessment under section 6861), prior to the expiration of the period during which the assessment of the deficiency would be prohibited if section 6861(a) were not applicable.

(B) EXCEPTIONS.—Such property may be sold if—

(i) the taxpayer consents to the sale,

(ii) the Secretary or his delegate determines that the expenses of conservation and maintenance will greatly reduce the net proceeds, or

(iii) the property is of the type described in section 6336.

(C) APPLICABILITY.—Subparagraphs (A) and (B) shall be applicable only with respect to a jeopardy assessment made on or after January 1, 1955, and shall apply with respect to taxes imposed by this title and with respect to taxes imposed by the Internal Revenue Code of 1939.

SEC. 7422. CIVIL ACTIONS FOR REFUND.

[Sec. 7422(a)]

(a) NO SUIT PRIOR TO FILING FOR REFUND.—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof.

Treasury Regulation.

§ 301.6211-1. DEFICIENCY DEFINED.

(a) In the case of the income tax imposed by subtitle A of the Code, the estate tax imposed by chapter 11, subtitle B of the Code, or the gift tax imposed by chapter 12,

subtitle B of the Code, the term "deficiency" means the excess of the tax (income, estate, or gift tax, as the case may be) over the sum of the amount shown as such tax by the taxpayer upon his return and the amounts previously assessed (or collected without assessment) as a deficiency, but such sum shall first be reduced by the amount of rebates made. If no return is made, or if the return (except a return of income tax pursuant to sec. 6014) does not show any tax, for the purpose of the definition "the amount shown as the tax by the taxpayer upon his return" shall be considered as zero. Accordingly, in any such case, if no deficiencies with respect to the tax have been assessed, or collected without assessment, and no rebates with respect to the tax have been made, the deficiency is the amount of the tax imposed by subtitle A, chapter 11, or chapter 12. Additional tax shown on an "amended return", so-called, filed after the due date of the return, is a deficiency within the meaning of the Code.

Internal Revenue Act of 1926.

Sec. 274. (a) If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. Except as otherwise provided in subdivision (d) or (f) of this section or in section 279, 282, or 1001, no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to

the taxpayer, nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3224 of the Revised Statutes the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

Sec. 279. (a) If the Commissioner believes that the assessment or collection of a deficiency will be jeopardized by delay, he shall immediately assess such deficiency (together with all interest, additional amounts, or additions to the tax provided for by law) and notice and demand shall be made by the collector for the payment thereof.

(b) If the jeopardy assessment is made before any notice in respect of the tax to which the jeopardy assessment relates has been mailed under subdivision (a) of section 274, then the Commissioner shall mail a notice under such subdivision within 60 days after the making of the assessment.

(c) The jeopardy assessment may be made in respect of a deficiency greater or less than that notice of which has been mailed to the taxpayer, despite the provisions of subdivision (f) of section 274 and whether or not the taxpayer has theretofore filed a petition with the Board of Tax Appeals. The Commissioner shall notify the Board of the amount of such assessment, if the petition is filed with the Board before the making of the assessment or is subsequently filed, and the Board shall have jurisdiction to redetermine the entire amount of the deficiency and of all amounts assessed at the same time in connection therewith.

Sec. 312. (a) If a deficiency has been assessed under subdivision (d) of section 308, the executor, within 30 days after notice and demand from the collector for the payment thereof, may file with the collector a claim for the abatement of such deficiency, or any part thereof, or of any interest or additional amounts assessed in connection therewith, or of any part of any such interest or additional amounts. Such claim shall be accompanied by a bond, in such amount, not exceeding double the amount of the claim, and with such sureties, as the collector deems necessary, conditioned upon the payment of so much of the amount of the claim as is not abated, together with interest thereon as provided in subdivision (c) of this section. Upon the filing of such claim and bond, the collection of so much of the amount assessed as is covered by such claim and bond shall be stayed pending the final disposition of the claim.

(b) If a claim is filed as provided in subdivision (a) of this section the collector shall transmit the claim immediately to the Commissioner who shall by registered mail notify the executor of his decision on the claim. The executor may within 60 days after such notice is mailed file an appeal with the Board of Tax Appeals. If the claim is denied in whole or in part by the Commissioner (or by the Board in case an appeal has been filed) the amount, the claim for which is denied, shall be collected as part of the tax upon notice and demand from the collector, and the amount, the claim for which is allowed, shall be abated. A proceeding in court may be begun for any part of the amount, claim for which is allowed by the Board. Such proceeding shall be begun within one year after the final decision of the Board, and may be begun within such year

even though the period of limitation prescribed in section 310 has expired.

Sec. 308. (a) If the Commissioner determines that there is a deficiency in respect of the tax imposed by Part I of this title, the executor, except as provided in subdivision (d), shall be notified of such deficiency by registered mail, but such deficiency shall be assessed only as hereinafter provided. Within sixty days after such notice is mailed the executor may file an appeal with the Board of Tax Appeals established by section 900.

(b) If the Board determines that there is a deficiency, the amount so determined shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the Board shall be assessed, but a proceeding in court may be begun, without assessment, for the collection of any part of the amount so disallowed. The court shall include in its judgment interest upon the amount thereof at the rate of 6 per centum per annum from the date prescribed for the payment of the tax to the date of the judgment. Such proceedings shall be begun within one year after the final decision of the Board, and may be begun within such year even though the period of limitation prescribed in section 310 has expired.

(c) If the executor does not file an appeal with the Board within the time prescribed in subdivision (a) of this section, the deficiency of which the executor has been notified shall be assessed, and shall be paid upon notice and demand from the collector.

(d) If the Commissioner believes that the assessment or collection of a deficiency will be jeopardized by delay, such deficiency shall be assessed immediately and notice

and demand shall be made by the collector for the payment thereof. In such case the assessment may be made (1) without giving the notice provided in subdivision (a) of this section, or (2) before the expiration of the 60-day period provided in subdivision (a) of this section even though such notice has been given, or (3) at any time prior to the final decision by the Board upon such deficiency even though the executor has filed an appeal. If the executor does not file a claim in abatement as provided in section 312, the deficiency so assessed (or, if the claim so filed covers only a part of the deficiency, then the amount not covered by the claim) shall be paid upon notice and demand from the collector.

Sec. 274. (a) If, in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the taxpayer, except as provided in subdivision (d), shall be notified of such deficiency by registered mail, but such deficiency shall be assessed only as hereinafter provided. Within sixty days after such notice is mailed the taxpayer may file an appeal with the Board of Tax Appeals established by section 900.

(b) If the Board determines that there is a deficiency, the amount so determined shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the Board shall be assessed, but a proceeding in court may be begun, without assessment, for the collection of any part of the amount so disallowed. The court shall include in its judgment interest upon the amount thereof at the rate of 6 per centum per annum from the date prescribed for the payment of the tax to the date of the judgment. Such proceeding shall be begun within one year after the final decision of the

Board, and may be begun within such year even though the period of limitation prescribed in section 277 has expired.

(c) If the taxpayer does not file an appeal with the Board within the time prescribed in subdivision (a) of this section, the deficiency of which the taxpayer has been notified shall be assessed, and shall be paid upon notice and demand from the collector.

(d) If the Commissioner believes that the assessment or collection of a deficiency will be jeopardized by delay such deficiency shall be assessed immediately and notice and demand shall be made by the collector for the payment thereof. In such case the assessment may be made (1) without giving the notice provided in subdivision (a) of this section, or (2) before the expiration of the 60-day period provided in subdivision (a) of this section even though such notice has been given, or (3) at any time prior to the final decision by the Board upon such deficiency even though the taxpayer has filed an appeal. If the taxpayer does not file a claim in abatement as provided in section 279 the deficiency so assessed (or, if the claim so filed covers only a part of the deficiency then the amount not covered by the claim) shall be paid upon notice and demand from the collector.

CLAIMS IN ABATEMENT.

Sec. 279. (a) If a deficiency has been assessed under subdivision (d) of section 274, the taxpayer, within 10 days after notice and demand from the collector for the payment thereof, may file with the collector a claim for the abatement of such deficiency, or any part thereof, or of any interest or additional amounts assessed in connection therewith, or of any part of any such interest or additional amounts. Such claim shall be accompanied by a

bond, in such amount, not exceeding double the amount of the claim, and with such sureties, as the collector deems necessary, conditioned upon the payment of so much of the amount of the claim as is not abated, together with interest thereon as provided in subdivision (c) of this section. Upon the filing of such claim and bond, the collection of so much of the amount assessed as is covered by such claim and bond shall be stayed pending the final disposition of the claim.

(b) If a claim is filed as provided in subdivision (a) of this section the collector shall transmit the claim immediately to the Commissioner who shall by registered mail notify the taxpayer of his decision on the claim. The taxpayer may within 60 days after such notice is mailed file an appeal with the Board of Tax Appeals. If the claim is denied in whole or in part by the Commissioner (or by the Board in case an appeal has been filed) the amount, the claim for which is denied, shall be collected as part of the tax upon notice and demand from the collector, and the amount, the claim for which is allowed, shall be abated. A proceeding in court may be begun for any part of the amount, claim for which is allowed by the Board. Such proceeding shall be begun within one year after the final decision of the Board, and may be begun within such year even though the period of limitation prescribed in section 277 has expired.

(c) If the claim in abatement is denied in whole or in part, there shall be collected, at the same time as the part of the claim denied, and as a part of the tax, interest at the rate of 6 per centum per annum upon the amount of the claim denied, from the date of notice and demand from the collector under subdivision (d) of section 274 to the date of the notice and demand under subdivision (b) of this section. If the amount included in the notice and de-

mand from the collector under subdivision (b) of this section is not paid in full within 10 days after such notice and demand, then there shall be collected, as part of the tax, interest upon the unpaid amount at the rate of 1 per centum a month (or, in the case of estates of incompetent, deceased, or insolvent persons, at the rate of 6 per centum per annum) from the date of such notice and demand until it is paid.

(d) Except as provided in this section, no claim in abatement shall be filed in respect of any assessment made after the enactment of this Act in respect of any income, war-profits, or excess-profits tax.

TITLE IX.—BOARD OF TAX APPEALS

Sec. 900. (a) There is hereby established a board to be known as the Board of Tax Appeals (hereinafter referred to as the "Board"). The Board shall be composed of seven members, except that for a period of two years after the enactment of this Act the Board shall be composed of such number of members, not more than twenty-eight, as the President determines to be necessary.

Internal Revenue Act of 1918.

[This material is from Barton & Browning, *Federal Income and Estate Tax Laws*, 4th ed., John Byrne & Co., Washington, D.C. (1929).]

CLOSING BY COMMISSIONER OF TAXABLE YEAR.

Sec. 250. (g) If the Commissioner finds that a taxpayer designs quickly to depart from the United States or to remove his property therefrom, or to conceal himself or his property therein, or to do any other act tending to prejudice or to render wholly or partly ineffectual proceedings

to collect the tax for the taxable year then last past or the taxable year then current unless such proceedings be brought without delay, the Commissioner shall declare the taxable period for such taxpayer terminated at the end of the calendar month then last past and shall cause notice of such finding and declaration to be given the taxpayer, together with a demand for immediate payment of the tax for the taxable period so declared terminated and of the tax for the preceding taxable year or so much of said tax as is unpaid, whether or not the time otherwise allowed by law for filing return and paying the tax has expired; and such taxes shall thereupon become immediately due and payable. In any action or suit brought to enforce payment of taxes made due and payable by virtue of the provisions of this subdivision the findings of the Commissioner, made as herein provided, whether made after notice to the taxpayer or not, shall be for all purposes presumptive evidence of the taxpayer's design. A taxpayer who is not in default in making any return or paying income, war-profits, or excess-profits tax under any Act of Congress may furnish to the United States, under regulations to be prescribed by the Commissioner with the approval of the Secretary, security approved by the Commissioner that he will duly make the return next thereafter required to be filed and pay the tax next thereafter required to be paid. The Commissioner may approve and accept in like manner security for return and payment of taxes made due and payable by virtue of the provisions of this subdivision, provided the taxpayer has paid in full all other income, war-profits, or excess-profits taxes due from him under any Act of Congress. If security is approved and accepted pursuant to the provisions of this subdivision and such further or other security with respect to the tax or taxes covered thereby is given as the Com-

missioner shall from time to time find necessary and require, payment of such taxes shall not be enforced by any proceedings under the provisions of this subdivision prior to the expiration of the time otherwise allowed for paying such respective taxes.

see

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